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In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES OF AMERICA, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

1. Whether the Nuclear Regulatory Commission violated the National Environmental Policy Act in adopting a "fuel cycle" rule (which specifies environmental releases from high level waste disposal and other uranium fuel cycle operations, for use in nuclear power plant environmental impact statements) because the rule does not permit reconsideration, in individual licensing proceedings, of uncertainties in the prospects for safe high-level waste disposal.

2. Whether the original and interim versions of the "fuel cycle" rule forbade consideration in individual cases of health, socioeconomic, cumulative, and similar effects from the releases specified in the rule, and were consequently invalid.*

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* The proceedings in the court of appeals encompassed four consolidated cases: Nos. 74-1586, 77-1448, 79-2110, and 79-2131 (D.C. Cir.). Petitioners in those proceedings were Natural Resources Defense Council, Inc. (Nos. 74-1586, 77-1448, and 79-2131), Consolidated National Intervenors (No. 74-1586), and the State of New York (No. 79-2110). Respondents in all four cases were the United States Nuclear Regulatory Commission and the United States. Intervenors in various of the consolidated cases were: Baltimore Gas and Electric Company, Boston Edison Company, Carolina Power & Light Company, Commonwealth Edison Company, The Connecticut Light and Power Company, Consumers Power Company, The Detroit Edison Company, Exxon Nuclear Company, Inc., The Hartford Electric Light Company, Long Island Lighting Company, New England Electric System, Niagara Mohawk Power Corporation, Northeast Nuclear Energy Company, Northeast Utilities Service Company, Omaha Public Power District, Pacific Gas and Electric Company, Pacific Legal Foundation, Pennsylvania Power & Light Company, Philadelphia Electric Company, Power Author-

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ity of the State of New York, Public Service Company of Indiana, Inc., Public Service Electric and Gas Company, Rochester Gas and Electric Corporation, San Diego Gas & Electric Company, Southern California Edison Company, Tennessee Valley Authority, Virginia Electric and Power Company, Western Massachusetts Electric Company, the State of Wisconsin, and Yankee Atomic Electric Company.

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NATURAL RESOURCES DEFENSE COUNCIL, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the United States Nuclear Regulatory Commission and the United States of America, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-181a)[1] is not yet officially reported. The rules which were the subject of the review proceedings in the

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[1] Because the petition for a writ of certiorari filed by Commonwealth Edison Company, *et al.*, reproduces all of the materials required by Rule 21(k), we refer to the appendix to that petition, rather than duplicate the materials found there. Hereinafter, "Pet. App." signifies that appendix.

court of appeals were promulgated by the Nuclear Regulatory Commission at 39 Fed. Reg. 14188 (1974) (original fuel cycle rule), 42 Fed. Reg. 13803 (1977) (interim fuel cycle rule), 43 Fed. Reg. 15613 (1978) (amended interim rule), and 44 Fed. Reg. 45362 (1979) (final fuel cycle rule).

JURISDICTION

The judgment of the court of appeals (Pet. App. 182a-184a) was entered on April 27, 1982. A petition for rehearing was denied on June 30, 1982 (Pet. App. 185a-187a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 102 of the National Environmental Policy Act of 1969, 42 U.S.C. 4332, is reproduced in Pet. App. 431a-434a. The original, interim, and amended interim versions of the Table S-3 Rule are reproduced in Pet. App. 237a-239a, 254a-258a, and 271a-273a. The final version of the Table S-3 Rule, 10 C.F.R. 51.20(e), 51.23(c), is reproduced in Pet. App. 378a-383a.

STATEMENT

In *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 548-549 (1978), this Court reversed a decision of the D.C. Circuit which had held invalid the United States Nuclear Regulatory Commission's ("NRC")[2] original rule addressing the environmental

[2] The licensing and regulatory functions of the Atomic Energy Commission were transferred to the NRC by the Energy Reorganization Act of 1974, 42 U.S.C. 5801 *et seq.* For the sake of clarity we will refer to both agencies as "NRC."

impact of the nuclear fuel cycle for purposes of the National Environmental Policy Act, 42 U.S.C. 4321 *et seq.* ("NEPA"), and remanded the case for review of the rule in accordance with the Administrative Procedure Act. The court of appeals consolidated that case with petitions for review of later versions of the same rule and again held the rule (in all its versions) invalid. Petitioners seek review of that judgment.

1. In 1974 the NRC, after considering public comments and holding an informal rulemaking hearing, promulgated a rule which provided for consideration of the environmental effects of the uranium fuel cycle in the environmental impact statement ("EIS") which accompanies licensing proceedings for nuclear reactors. 39 Fed. Reg. 14188. The rule included a table ("Table S-3") stating the natural resources used and effluents released annually by fuel cycle activities supporting a typical light water nuclear reactor.[3] The rule stated that in individual licensing proceedings the environmental impact from a proposed reactor should be as set out in Table S-3, and that "[n]o further discussion of such environmental effects shall be required." *Id.* at 14191.

The Natural Resources Defense Council, Inc. ("NRDC") and others challenged the Table S-3 rule in the D.C. Circuit,[4] which held the rule invalid be-

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[3] These activities include uranium mining and milling, the production of uranium hexafluoride, isotopic enrichment, fuel fabrication, reprocessing of irradiated fuel, transportation of radioactive materials, and management of low level wastes and high level wastes. 10 C.F.R. 51.20(e).

[4] This case is No. 74-1586 (D.C. Cir.). The case was consolidated at that time with a challenge to the award of an operating license for a plant to be operated by Vermont Yankee Nuclear Power Corp.

cause of perceived inadequacies in the rulemaking procedures. *Natural Resources Defense Council, Inc.* v. *NRC*, 547 F.2d 633 (D.C. Cir. 1976). The court of appeals found that "[r]egarding most phases of the fuel cycle, * * * [the materials underlying the table] did an adequate, even admirable job * * *. However, with regard to the two phases of the fuel cycle which are the focal points for this appeal, reprocessing and waste disposal, that kind of detailed explanation and support * * * was noticeably absent * * *." *Id.* at 647 (footnote omitted). The court attributed that deficiency to the absence of any "genuine dialogue" (*id.* at 653), itself the result of procedural inadequacies.

On October 18, 1976, in response to that decision, the NRC initiated proceedings to review the portion of the rule dealing with radioactive waste disposal. 41 Fed. Reg. 45849. It prepared a new in-depth survey of that problem, Office of Nuclear Material Safety and Safeguards, United States Nuclear Regulatory Commission, *Environmental Survey of the Reprocessing and Waste Management Portions of the LWR Fuel Cycle*, NUREG-0116 (1976), and invited comments on the survey. In March, 1977 the NRC promulgated a new ("interim") Table S-3 rule which differed only slightly from the original rule; soon thereafter NRDC petitioned for review of the interim rule (No. 77-1448 (D.C. Cir.)).

2. In 1978 this Court reversed the court of appeals' decision invalidating the original Table S-3 rule. *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*. The Court noted that the NRC's authority to deal with fuel cycle issues by informal rulemaking, rather than adjudication, was not seriously questioned. 435 U.S. at 535 n.13. It then concluded that so long as the NRC had complied with the statutory minima it should be allowed to fashion its own rules

of procedure for rulemaking, free from additional requirements that a reviewing court might believe would produce a better record. Since nothing in the Administrative Procedure Act, 5 U.S.C. 553, or NEPA directed the use of procedures more formal or adjudicatory than those the NRC had employed, the court of appeals had erred in its invalidation of the fuel cycle rulemaking on procedural grounds. 435 U.S. at 541-548. This Court conceded that the court of appeals might, on remand, find insufficient substantive justification in those proceedings to sustain the rule.[5]

3. Before this Court's decision in *Vermont Yankee*, the NRC had reopened hearings to determine whether it should make the interim fuel cycle rule final. 42 Fed. Reg. 26987 (1977). On July 27, 1979, on the basis of an extensive rulemaking record, it did so. 44 Fed. Reg. 45362. The notice of final rulemaking devoted substantial discussion to the impacts and uncertainties associated with disposal of high-level radioactive waste (*id.* at 45367-45369). In particular, the NRC acknowledged uncertainties regarding:

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[5] In the same opinion the Court also reversed the D.C. Circuit's decision in *Aeschliman* v. *NRC*, 547 F.2d 622 (D.C. Cir. 1976), consolidated in this Court with *Vermont Yankee*. In *Aeschliman* the court of appeals found an EIS fatally defective for failure to explore energy conservation as an alternative to construction of the proposed plant. 435 U.S. at 536-537. This Court held that the NRC, "unlike the Court of Appeals, [had properly] recognized that the Licensing Board's decision had to be judged by the information then available to it." *Id.* at 553. At the time the EIS was prepared, the need for and the means of energy conservation were not matters given much attention. Moreover, the intervenors had done little to focus the NRC's consideration on those issues. *Id.* at 550-554.

(i) the likelihood of finding a suitable repository for such waste, and (ii) the probability that the repository would perform as expected. Concerning the latter issue, however, it concluded that "[t]he only apparent natural mechanisms cited which might reasonably cause major releases involved very low probability catastrophic events," while more likely occurrences such as leakage of water into the repository "would take tens of thousands of years" to transport radioactive materials out of the repository area (*id.* at 45369). The Commission stated that, "[g]iven the staff's assumption that volatile fission products are totally released before the repository is sealed, the * * * taking post-sealing releases as zero does not significantly reduce the overall conservatism of the table" (*ibid.*). Regarding the former issue—the likelihood of finding a suitable disposal site—the NRC found the evidence "tentative but favorable," and the record "as strong * * * as [it] can be made on the issue" (*id.* at 45368).

Consequently the final rule, which now applies to NEPA aspects of reactor licensing proceedings, does not permit reconsideration by individual Atomic Safety and Licensing Boards[6] of the NRC's conclusion that high-level waste can be disposed of as described in Table S-3. 10 C.F.R. 51.20(e) & Table S-3, n.1, 51.23(c), 51.26(a). The Commission rejected a suggestion by NRDC that it allow such reconsideration, stating:

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[6] The Atomic Safety and Licensing Boards are the first step in the licensing process for nuclear plants. Their decisions are reviewable by the Atomic Safety and Licensing Appeal Board, and ultimately by the NRC. See 10 C.F.R. 2.721, 2.785, 2.786.

> On the individual reactor licensing level, where the proceedings deal with fuel cycle issues only peripherally, the Commission sees no advantage in having licensing boards repeatedly weigh for themselves the effect of uncertainties on the selection of fuel cycle impacts for use in cost-benefit balancing. This is a generic question properly dealt with in this rulemaking as part of choosing what impact values should go into the fuel cycle rule. The Commission concludes, having noted that uncertainties exist, that for the limited purpose of the fuel cycle rule it is reasonable to base impacts on the assumption which the Commission believes the probabilities favor, *i.e.*, that bedded-salt repository sites can be found which will provide effective isolation of radioactive waste from the biosphere.

44 Fed. Reg. 45369 (1979) (footnote omitted). On the other hand, such matters as health, socioeconomic, cumulative, and similar effects from the environmental releases listed in the table must, according to the final rule, be litigated in individual cases. 10 C.F.R. 51.20(e) & Table S-3, n.1, 51.23(c), 51.26 (a); 44 Fed. Reg. 45371 (1979).

4. NRDC (No. 79-2131 (D.C. Cir.)) and the State of New York (No. 79-2110 (D.C. Cir.)) filed petitions for review which were consolidated with the pending challenges to the original and interim versions of the rule. The court held all three versions invalid (Pet. App. 1a-181a).

a. Judge Bazelon, joined by Judge Edwards (sitting by designation), concluded that the final rule and its predecessors violated Section 102(2)(C) of NEPA, 42 U.S.C. 4332(2)(C), because they required licensing boards in individual proceedings to assume that high-level waste could be disposed of as indicated in Table S-3. Judge Bazelon conceded that the

NRC had considered and disclosed the uncertainties attending that judgment in promulgating the fuel cycle rule.[7] He also said that he did "not decide * * * the reasonableness of the Commission's conclusion that the probabilities favor the zero-release assumption" (Pet. App. 35a n.96). He nevertheless found that waste disposal presented "significant environmental risks"—which he defined as "the product of the environmental damage that could occur and the probability of its occurrence" (*id.* at 36a & n.100). Such risks were themselves environmental "costs" for NEPA purposes (*id.* at 37a), and Section 102 (2)(C) required "that environmental costs be considered 'at every stage where an overall balancing of environmental and nonenvironmental factors is appropriate' " (Pet. App. 46a, quoting *Calvert Cliffs' Coordinating Committee, Inc.* v. *AEC*, 449 F.2d 1109, 1118 (D.C. Cir. 1971)). Because proceedings before a licensing board were such a stage, the rule was invalid because it removed waste disposal costs from the "ledger" (Pet. App. 44a) of costs and benefits drawn up by licensing boards in individual actions.[8]

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[7] "In * * * the Statements of Consideration for the interim and final Rules, the Commission repeatedly acknowledged the uncertainties involved in its 'judgments' " (Pet. App. 35a n.97). "[T]he Commission [engaged in] investigation, analysis, and deliberation prior to the Rule's promulgation * * *" (*id.* at 43a).

[8] NRDC also argued that the fuel cycle rule was invalid because it did not permit consideration of other uncertainties in addition to the disposal problem. The court found that NRDC had not "indicated where those uncertainties lie or what values in the Table obscure them" (Pet. App. 50a). It nevertheless indicated that the NRC on remand was expected to extend its assessment of uncertainties to the entire Table (*id.* at 52a).

b. The court also held that the original and interim rules were invalid because they precluded consideration of the tangible health, socioeconomic, cumulative, and similar effects caused by the impacts specified in Table S-3.[9] NEPA requires, the court stated, that such effects be disclosed in an EIS (Pet. App. 53a). See 40 C.F.R. 1508.7, 1508.8. But the original and interim rules directed that "the contribution of the environmental effects of * * * fuel cycle activities * * * shall be as set forth in the following Table S-3 * * *. No further discussion of such environmental effects shall be required." 39 Fed. Reg. 14191 (1974); 42 Fed. Reg. 13806 (1977).[10] Although the court did not find that the language of the rules unambiguously forbade consideration of health and similar effects, it believed that the rule had been so interpreted. The court relied in particular on the NRC's statement (44 Fed. Reg. 45364 (1979)) that the rule "at least initially was apparently interpreted as cutting off further discussion of fuel cycle impacts" (Pet. App. 57a).[11]

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[9] Judge Wilkey did not concur in this portion of Judge Bazelon's opinion. He also did not address the issue in his dissenting opinion; he did state at one point, however, that the original rule "permitted no further discussion of [environmental] effects in individual proceedings" (Pet. App. 138a, n.60).

[10] In 1978 the interim rule was amended so that it specifically permitted consideration of such effects. 43 Fed. Reg. 15613, 15616-15617. As we have mentioned, page 7 above, the final version of the rule requires that they be considered.

[11] Judge Bazelon, joined by Judge Wilkey, rejected New York's argument that the effluent-release values in Table S-3 assumed the use of technology that is economically infeasible (Pet. App. 61a-69a).

c. Judge Wilkey dissented (Pet. App. 117a-181a). He found the majority's opinion "no more than a giant step sideways from an analysis rejected unanimously by the Supreme Court in *Vermont Yankee*" (*id.* at 180a). Insofar as NEPA required consideration and disclosure of environmental consequences during the planning stage of agency actions, he said, its demands were satisfied by the NRC's careful consideration and explicit disclosure of any uncertainties attending waste disposal. The Act did not impose the further procedural requirement, added by the court, that those uncertainties be reconsidered in individual licensing proceedings (*id.* at 158a-163a). Judge Wilkey also concluded that the court had exceeded the limits on substantive review of agency decisions (*id.* at 166). The choice to proceed with reactor licensing in light of the uncertainties recognized by the Commission was "a quintessential *policy judgment*" (*ibid.*; emphasis in original), and by invalidating the rule because of its disagreement with that choice, the court had intervened in problems whose solution—if it is to be different from that advanced by the NRC—is to be found along avenues of political redress (*id.* at 167a, n.147).

REASONS FOR GRANTING THE PETITION

This Court has concluded that NEPA imposes essentially procedural requirements, and does not permit the judiciary to substitute its judgment for that of an agency concerning the weight to be given the environmental consequences of its actions. The court of appeals' decision ignores that direction. It also imposes on the NRC the court's own view, found nowhere in the Act, of the procedures an agency should follow in considering the environmental concerns made relevant by NEPA. Together with the

court's separate ground for overturning the original and interim versions of the rule, these conclusions will have serious implications for existing and future nuclear reactor licenses.

1. Section 102(2) of the National Environmental Policy Act, 42 U.S.C. 4332(2), states that

> all agencies of the Federal Government shall—
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> * * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action * * *.

It goes on to say that the responsible official shall consult with other interested federal agencies, and that copies of the statement and comments on it shall be made available to the public, "and shall accompany the proposal through the existing agency review processes" (*ibid.*). This Court has held that Section 102(2)(C) serves two purposes: "The first is to inject environmental considerations into the federal agency's decisionmaking process by requiring the agency to prepare an EIS. The second aim is to inform the public that the agency has considered environmental concerns in its decisionmaking process." *Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981).

It is beyond dispute that the NRC fulfilled those two purposes in this case. The final Table S-3 rule was promulgated on the basis of a record which included hundreds of pages of NRC staff analysis, more

than 1100 pages of prepared direct testimony, two rounds of witness questions prepared by participants and several hundred pages of responses, more than 1200 pages of transcript of oral hearings, written rebuttal testimony of participants, concluding statements, a 137-page report by the hearing board which summarized the record and outlined the significant issues, further written statements from participants, and oral argument before the Commission. 44 Fed. Reg. 45366-45367 (1979). Much of that record dealt with the issue of waste disposal. The notice of final rulemaking devoted significant discussion to the uncertainties associated with disposal of high-level radioactive waste (*id.* at 45367-45369). It explicitly addressed both the likelihood of finding a suitable repository for such waste, and the probability that the repository would perform as expected. The court of appeals recognized that the Commission had "repeatedly acknowledged the uncertainties involved in its 'judgments'" (Pet. App. 35a n.97), and had engaged in "investigation, analysis, and deliberation prior to the Rule's promulgation" (*id.* at 43a).

The NRC concluded, on the basis of the record and its own deliberations, that salt deposits (the medium proposed for disposal) had been found in 24 of the 50 states (44 Fed. Reg. 45368 n.22 (1979)). Because no specific site had yet been chosen, the evidence could only be "tentative" (44 Fed. Reg. 45368 (1979)); but what evidence there was, "coupled with the absence of any strong argument that a site cannot be found, probably affords as strong a record as can be made on the issue" of finding a suitable repository (*ibid.*).[12]

[12] The Commission noted its intent "to conduct a generic proceeding to reassess the outlook for the availability of safe waste disposal methods in light of new data and recent devel-

Concerning the escape of effluents from such a repository, the NRC noted that the table incorporated the conservative assumption "that the spent fuel storage canisters and the fuel rod cladding will be corroded [before a repository is closed] * * *, and [that all] volatile materials in the fuel will escape to the environment" (*ibid.*). Given that assumption, and the improbability that materials would escape after sealing (see page 6, *supra*), the NRC concluded that the table overall represented a conservative (inflated) statement of environmental impacts. It thus directed that the fuel cycle rule should be the basis for evaluating, in individual licensing proceedings, "the environmental effects of * * * management of * * * high level wastes related to uranium fuel cycle activities * * *." 10 C.F.R. 51.20(e). It also saw "no advantage in having licensing boards repeatedly weigh for themselves the effect of uncertainties on the selection of fuel cycle impacts for use in cost-benefit balancing" (44 Fed. Reg. 45369 (1979)).

Despite those clear conclusions, the court of appeals held that because the potential harm from undisposed-of spent fuel was so great, the disposal problem was one which must be included on the ledger of costs and benefits in each licensing proceeding even if the probability of harm occurring was low (see Pet. App. 36a-37a, n.100). The requirement imposed by the court can be understood only if one assumes that the uncertainty associated with

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opments in the Federal waste management program" (44 Fed. Reg. 45369 (1979)). See 44 Fed. Reg. 61372 (1979). That proceeding is now nearing conclusion. More than 50 participants have taken part, and a hearing was held before the NRC Commissioners in January 1982. We are informed by the NRC that it intends to reach a decision before June 30, 1983.

waste disposal *should* be decisive in some cases. The NRC, by contrast, concluded that whatever uncertainty attended the disposal problem should *not* be a reason for withholding a license in any individual case. See pages 12-13, *supra*.[13] Ultimately, the disagreement between the court of appeals and the Commission is a disagreement about the proper weight to assign, for NEPA purposes, to a risk of environmental harm that the NRC has determined is not great.

The court of appeals held that the NRC could not determine in advance that the disposal issue should not be decisive, because it might make a difference "if a plant's cost-benefit balance is close" (Pet. App. 47a). But that view of the matter rests on an accounting metaphor wholly inappropriate to the issues determined by licensing boards. The court itself (*id.* at 44a (the cost-benefit analysis may require "fictional values")) and respondent NRDC (Court of Appeals Joint Appendix Supplement 1390 (the uncertainties are "[n]on-quantifiable")) recognized that the values and drawbacks being considered were not quantifiable. Thus the "closeness" of any case is not an objectively determinable fact; it rests on a comparison of ultimately incommensurable factors. In making such a comparison it is not irrational to determine in advance that one of those factors should not be given decisive weight in any individual case.

The last time this case was before this Court, it concluded that "NEPA does set forth significant sub-

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[13] In a proposed narrative statement to accompany the fuel cycle rule the NRC states that it "has found * * * that the fuel cycle impacts addressed by Table S-3 cannot significantly affect the cost-benefit balance for a light water reactor." 46 Fed. Reg. 15155 (1981).

stantive goals for the Nation, but its mandate to the agencies is essentially procedural. * * * It is to insure a fully informed and well-considered decision, not necessarily a decision the judges of the Court of Appeals * * * would have reached had they been members of the decisionmaking unit of the agency." *Vermont Yankee, supra*, 435 U.S. at 558. Since then this Court has made the point more explicitly: "[O]nce an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot " 'interject itself within the area of discretion of the executive as to the choice of the action to be taken.' " *Strycker's Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227-228 (1980), quoting *Kleppe* v. *Sierra Club*, 427 U.S. 390, 410 n.21 (1976). The choice about whether to proceed in light of an acknowledged risk is precisely the kind of discretionary decision that Congress has left with the Commission. (See Pet. App. 171a-180a (Wilkey, J., dissenting).

2. The court of appeals not only exceeded the limitations on substantive review of agency NEPA determinations, it also directed that its view of the weight to be given the waste disposal issue should be implemented by procedures nowhere required in the Act. This Court has repeatedly stressed that "the only procedural requirements imposed by NEPA are those stated in the plain language of the Act." *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, *supra*, 435 U.S. at 548; *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 405-406; cf. *Weinberger* v. *Catholic Action of Hawaii*, *supra*, 454 U.S. at 144-145 (agency "not required to prepare a 'hypothetical' EIS nowhere mentioned in NEPA").

In *Vermont Yankee*, *supra*, this Court also rejected the court of appeals' conclusion that the NRC was "required to 'develop new procedures to accomplish the innovative task of implementing NEPA through rulemaking.'" 435 U.S. at 548. It upheld as sufficient under both NEPA and the Administrative Procedure Act, 5 U.S.C. 553, the process by which the Table S-3 Rule in question here was adopted. The rule directs that an applicant's environmental report, and the draft and final environmental impact statements, shall take Table S-3 as the basis for evaluating the environmental impact of the fuel cycle. 10 C.F.R. 51.20(e), 51.23(c), 51.26(a). The rule and the background materials supporting it, when incorporated into an EIS, provide precisely the kind of "detailed statement by the responsible official" concerning environmental impacts that the Act requires. 42 U.S.C. 4332(2)(C). It is also an example of the sort of timely consideration of environmental issues contemplated by NEPA; done generically, in advance of particular licensing proceedings, it "accompan[ies] the proposal through the existing agency review process * * *" (*ibid.*).

Fearful that this procedure—though fully consistent with the Act—does not provide sufficiently focused consideration of the uncertainties regarding waste disposal, the court of appeals has proposed two methods for structuring the thought processes of the decision-maker. In order to verify that the risk of environmental harm from spent fuel is explicitly weighed against the benefits of any proposed power plant, the court directed that that risk be treated as an environmental cost, and entered on the "ledger" of costs and benefits to be drawn up in each case (Pet. App. 44a). It also required that the risks of non-

disposal be considered by Atomic Safety and Licensing Boards (*id.* at 46a).[14]

NEPA does not mention performance of the kind of cost/benefit analysis demanded by the court of appeals. Its most pointed statement on the subject is simply that agencies should develop procedures for giving "unquantified environmental * * * values * * * appropriate consideration * * * along with economic and technical considerations" (42 U.S.C. 4332(2)(B)). That is not to suggest that cost/benefit analysis is not a procedure useful for implementing NEPA; it is in fact the method generally required by NRC in environmental impact statements. 10 C.F.R. 51.20(b), 51.23(c), 51.26(a). But as the D.C. Circuit has recognized in other contexts, it is inappropriate to demand that an agency cast its NEPA decisions in cost-benefit form where, as here, there is no scientific basis for quantified cost-benefit estimates. See *Natural Resources Defense Council, Inc.* v. *SEC*, 606 F.2d 1031, 1060 (D.C. Cir. 1979); *Environmental Defense Fund, Inc.* v. *Corps of Engineers*, 492 F.2d 1123, 1133 (5th Cir. 1974).

It is equally irrational to invalidate the fuel cycle rule because it fails to permit individual licensing boards to reconsider the NRC's determination that disposal uncertainties do not warrant denial of reactor licenses. Because that conclusion is a policy judgment rather than a factual finding, it is inevitable that different boards (like different courts) would assign different weights to the uncertainty, even in

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[14] The court stated that NRC might exclude consideration of such risks if it could determine that they were offset in all cases by generic benefits (Pet. App. 44a). It also realized that implementation of its proposal could "involve instructing case-specific decision-makers to insert fictional values into their cost-benefit analyses" (*ibid.*).

cases that presented otherwise similar costs and benefits. Moreover, because the Commission itself retains authority to review licensing board decisions, 10 C.F.R. 2.762, 2.786, affording boards the opportunity to disagree with its conclusions could well accomplish nothing more than delay in the issuance of licenses.[15]

3. The court of appeals not only held all three versions of the Table S-3 rule invalid for failure to allow licensing boards to reconsider the effect of disposal uncertainties; it also held the original and interim versions of the rule invalid because—it concluded—they forbade consideration in individual proceedings of the health, socioeconomic, and cumulative effects of the environmental impacts listed in the table.[16] What the original and interim rules said was that "the contribution of the environmental effects of * * * fuel cycle activities * * * shall be as set forth in the following Table S-3 * * * . No further discussion of such environmental effects shall be required." 39 Fed.

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[15] In *Calvert Cliffs' Coordinating Committee* v. *AEC*, 449 F.2d 1109 (D.C. Cir. 1971), the court held invalid a Commission rule that said individual licensing proceedings would not reexamine, for NEPA purposes, the effect a proposal would have on water quality, provided it conformed to standards set in the Federal Water Pollution Control Act. In an approach relied on by the court of appeals in this case (see Pet. App. 46a), the court held that the Commission's rule violated NEPA's mandate of "a case-by-case balancing judgment * * *." 449 F.2d at 1123. The next year Congress amended the Federal Water Pollution Control Act to overrule the court's decision. 33 U.S.C. 1371(c)(2).

[16] The court's invalidation did not extend beyond April of 1978, when the interim rule was amended to make clear that such effects were proper subjects for consideration in individual proceedings (Pet. App. 60a). See 43 Fed. Reg. 15616-15617 (1978).

Reg. 14191 (1974); 42 Fed. Reg. 13806 (1977). Obviously the rule was intended to preclude further discussion of the amounts of effluents released annually by a reactor of a given size; if it were not, the NRC would have accomplished little by its attempt to make a generic determination of effluents and the use of resources.

As the final rule makes clear, however, there is a difference between the amounts of effluents caused by reactor construction and operation, and the tangible consequences that those effluents have on human health, economy, society, and so on. 10 C.F.R. 51.23(c). Cf. 40 C.F.R. 1508.14. To say, as the original and interim rules did, that effluent releases shall be "as set forth" in Table S-3 obviously says nothing about the consequences of such releases, which have not been "set forth" in any version of the table. It was only "such environmental effects" as were "set forth" that individual proceedings were precluded from discussing further.

It is true, as the NRC pointed out when it promulgated the final rule, that the language of the earlier versions "at least initially was apparently interpreted as cutting off" discussion of the effects of effluent releases. 44 Fed. Reg. 45364 (1979). It was for that reason that the language of the rule was changed in the amended interim (see note 10, *supra*) and final versions. But even the notice accompanying the original version stated that the table was "to be used as a basis for *evaluating* the environmental effects in a cost-benefit analysis for a reactor," 39 Fed. Reg. 14190 (1974) (emphasis added), language that suggests the table was not meant to foreclose discussing the consequences of effluent releases. That the NRC staff did not address such matters during the first three years after promulgation of the original rule is

attributable not to any direction in the rule, but to the fact that the

> repeated observation [in the notice of rulemaking] that fuel cycle effects were "insignificant" amounted to a Commission judgment implicit in the rule that no discussion of these effects was formally required.

44 Fed. Reg. 45364 (1979). But when the Atomic Safety and Licensing Appeal Board suggested the desirability of discussing health effects for comparing nuclear with coal plants,[17] the staff sought and received permission from licensing boards to introduce evidence of public health consequences. Cf. *In re Public Service Company of Indiana, Inc. (Marble Hill Nuclear Generating Station, Units 1 and 2)*, 7 N.R.C. 179, 187 (1978).

The court of appeals, in invalidating the earlier versions of the rule, pointed to no case where evidence concerning health or similar consequences of the releases in Table S-3 was excluded from licensing proceedings. Its action amounts to holding those rules invalid on behalf of hypothetical intervenors in proceedings now closed, because of an effect the rules were not intended to have. What this Court said in *Vermont Yankee* should apply with equal force here (435 U.S. at 553): "[W]hile it is true that NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenors' position and contentions. This is especially true when the intervenors are re-

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[17] *In re Tennessee Valley Authority (Hartsville Nuclear Plant Units)*, 5 N.R.C. 92, 103 (1977).

questing the agency to embark upon an exploration of uncharted territory * * *."

4. If not reexamined by this Court, the decision of the court of appeals could have a substantial impact on electric utilities that rely on nuclear generating facilities. We are informed by the NRC that there are 46 plants with pending applications for construction or operation licenses. If the Commission is required to amend the fuel cycle rule to conform to the court of appeals' decision, and to allow individual licensing boards to weigh case-by-case the effect of the disposal issue, those licenses could be subject to significant delays. Another 22 plants are under construction, and some of those will seek operating licenses in the near future. Moreover, although the court stated that it reserved decision on the validity of licenses already issued (Pet. App. 69a), its invalidation of the original, interim, and final rules would seem inevitably to affect operating plants. The District of Columbia Circuit recently held that NEPA imposes on the NRC a continuing obligation to reassess the environmental impacts of a licensing decision in light of changed circumstances or newly available information. *People Against Nuclear Energy* v. *NRC*, 678 F.2d 222, 231-232 (D.C. Cir. 1982), petition for cert. pending, No. 82-358 (filed Aug. 30, 1982). If the court should determine that the invalidity of the earlier and current rules triggers that obligation, proceedings would have to be reopened for many of the 69 operating plants licensed since NEPA was enacted.

Those consequences are unwarranted. As this Court said the last time it reviewed this case (*Vermont Yankee*, *supra*, 435 U.S. at 557-558; emphasis in original):

Nuclear energy may some day be a cheap, safe source of power or it may not. But Congress has made a choice to at least try nuclear energy, establishing a reasonable review process in which courts are to play only a limited role. The fundamental policy questions appropriately resolved in Congress and in the state legislatures are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action. Time may prove wrong the decision to develop nuclear energy, but it is Congress or the States within their appropriate agencies which must eventually make that judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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